No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN HAYMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CITATIONS

Miscellaneous:

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit reversing the judgment of the District Court for the Southern District of California denying respondent's motion under 28 U. S. C. 2255 (1948 rev.) to vacate a judgment of conviction and sentence previously imposed upon him in that court, and remanding the cause to the District Court with directions to dismiss respondent's motion so as to leave him free to institute a habeas corpus proceeding in the district court for the district in which he is imprisoned.

OPINIONS BELOW

The opinions in the Court of Appeals on respondent's appeal (R. 23–43) and on the Government's petition for rehearing (R. 46–51) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1950 (R. 44), and the Government's petition for rehearing was denied on February 26, 1951 (R. 45). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether 28 U. S. C. 2255, which requires a prisoner who wishes to test the legality of his detention under sentence of a federal court to seek relief in the court which imposed the sentence and permits him to apply for a writ of habeas corpus only if the remedy by motion proves inadequate or ineffective, violates Art. 1, Sec. 9, cl. 2 of the Constitution, which prohibits the suspension of the privilege of the writ of habeas corpus except when public safety may require it in cases of rebellion or invasion.

2. Whether Section 2255 provides an adequate remedy for prisoners confined outside the district in which they were tried when the motion filed under Section 2255 raises factual issues requiring a hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. 2255:

> A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court

shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Art. I, Sec. 9, cl. 2 of the Constitution:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

STATEMENT

Respondent is confined in the United States Penitentiary at McNeil Island, within the West-

ern District of Washington, where he is serving a sentence of 20 years' imprisonment imposed, on January 20, 1947, by the District Court for the Southern District of California. On May 11, 1949, he filed a motion in the sentencing court, pursuant to 28 U. S. C. 2255, attacking the validity of his conviction as having been obtained in violation of the Sixth Amendment (R. 1–4). He also moved the court for a writ of habeas corpus to bring him from his place of confinement to Los Angeles, California, to testify as to the facts averred in his motion papers (R. 4). In his motion, as amended June 8, 1949 (R. 5–7), he alleged three grounds in support of the relief claimed (R. 1–3), the third of which (the only allegation involved here (R. 3)) was to the effect "that he was deprived of the right to have the assistance of counsel for his defense" because his attorney, without his knowledge and consent, also represented the "codefendant Juanita Jackson," the prosecution's witness who testified against him, "thus creating conflict of interest." (R. 3.)

The District Court, after notifying the United States Attorney of the date of the hearing, but without similarly advising respondent, conducted a hearing on the motion which lasted three days (R. 8, 24). At this hearing the court "received the evidence of the government witnesses who testified to the court, among them the United States Attorney and the appellant's [trial] attorney" (R. 24). Respondent was not present

at this hearing, nor was he represented by counsel (R. 8, 24). On the basis of the evidence adduced at the hearing, the court found that on December 9, 1946, Juanita Jackson, though not a defendant with respondent, had pleaded guilty before a different judge to violating the same statute as respondent, and was awaiting sentence thereon when respondent was tried on January 7, 1947 (R. 11, 24). Respondent had engaged an attorney of his own choosing to conduct his defense at the trial, which was without a jury (R. 9–10). His attorney was the same counsel who was representing Jackson while the latter was awaiting sentence (R. 11). The court also found that respondent's attorney represented Jackson "with the knowledge and consent and at the instance and request of the defendant herein, Herman Hayman" (R. 11–12). Sentences were imposed on both respondent and Jackson on January 20, 1947 (R. 9, 11).[1] On the basis of the evidence, the District Court denied respondent's motion to vacate his conviction (R. 12–13).

On respondent's appeal from the order of the District Court denying his motion to vacate his conviction, the Court of Appeals, upon the basis of separate opinions of Chief Judge Denman and Judge Stephens (R. 22–39), reversed the District

[1] Respondent appealed to the Court of Appeals for the Ninth Circuit, which affirmed his conviction in a per curiam order on November 7, 1947. *Hayman* v. *United States*, 163 F. 2d 1018 (C. A. 9).

Court's order and, *sua sponte,* ordered the dismissal of respondent's motion in order to permit him to file a petition for a writ of habeas corpus (R. 36, 44). Judge Pope dissented; he would have affirmed the District Court's order (R. 39–43).

The opinion of Chief Judge Denman (R. 22–36), after expressing strong doubts as to the constitutionality of Section 2255, found that the motion provided an "inadequate and ineffective" remedy witnin the meaning of Section 2255 since it afforded respondent no opportunity to prove facts outside the record by which to test the legality of his detention. The opinion reasons that the motion and the proceedings had thereunder showed that, in addition to an issue of law, an issue of fact was tendered with respect to the denial to respondent of effective assistance of counsel, requiring an evidentiary hearing as to facts *dehors* the record of the original trial; that respondent was entitled to be present at this hearing of factual issues; and that since the court of conviction where the motion was made is in a district other than that in which respondent is confined, the court had no power to command the production of the prisoner within its jurisdiction. Chief Judge Denman stated (R. 34–35) that he did not agree with the decision of the Court of Appeals for the Tenth Circuit in *Barrett* v. *Hunter,* 180 F. 2d 510, certiorari denied, 340 U. S. 897.

938563—51——2

Judge Stephens reasoned (R. 36–39) that Section 2255, in requiring a motion thereunder as a condition precedent to an application for a writ of habeas corpus, and making an adverse judgment on such motion, after an *ex parte* hearing, *res judicata*, is unconstitutional because it suspends and, in effect, denies the writ of habeas corpus, in contravention of Art. I, Sec. 9, cl. 2 of the Constitution.

Judge Pope was of the opinion (R. 39–43) that the constitutionality of Section 2255 was not involved, since respondent did not seek relief by habeas corpus and had not been denied such relief because of the prohibitions of the statute. He concluded that, inasmuch as a reexamination of the record by the trial court and an examination of the moving papers "conclusively show that the prisoner is entitled to no relief," it was entirely within the judge's discretion to deny respondent's motion, even without any hearing, *ex parte* or otherwise (R. 43).

In view of the situation created by the divergent views of three of the seven judges of the Ninth Circuit as to an important and recurring question, and the lack of a majority holding, the United States petitioned the court for a rehearing and moved for a reconsideration of the case *en banc* (R. 45). In denying the petition for rehearing, Chief Judge Denman, writing for himself and Judge Stephens, resolved the difference in views between his opinion and that of Judge

Stephens, which was urged as one of the grounds for a rehearing, by stating that each agreed with the reasoning of the other, as an alternative ground for decision.[2] Both judges thereby concurred "in a reversal on the ground that Section 2255 is unconstitutional because not a substitute for the writ of habeas corpus and yet denies that writ if the motion is denied" (R. 46). The opinion on rehearing (R. 46–49) again recognized the conflict with opposing decisions, calling attention to a recent decision of the Court of Appeals for the Eighth Circuit (*Weber* v. *Steele*, 185 F. 2d 799) as creating "a further ground for certiorari."

Judge Pope again dissented (R. 50–51); he expressed the view that Section 2255 should be construed as empowering a court outside the district of confinement to secure the presence of the prisoner-applicant, and that the section is constitutional.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that 28 U. S. C. 2255 provides a proceeding which, at best, can afford only a

[2] The opinion erroneously interpreted the Government's suggestion "that the judgment be reversed solely on the ground that a factual issue * * * [the effective assistance of counsel] is raised which requires appellant's presence at the hearing below," as a concession of the validity of respondent's allegation that he had been denied the effective assistance of counsel (R. 46).

hearing *ex parte* to the prosecution and without notice to the prisoner so as to be inherently defective because it denies the movant a fair hearing.

2. In holding that the sentencing court has no power, either impliedly under Section 2255 or expressly under 28 U. S. C. 1651, to issue ancillary process in aid of its jurisdiction so as to command the production of a federal prisoner from a distant district for purposes of a hearing on a motion brought under Section 2255.

3. In holding that Section 2255 is unconstitutional.

4. In ordering the dismissal of respondent's motion under Section 2255, rather than remanding the proceeding to the District Court for a hearing on the merits with respondent present.

REASONS FOR GRANTING THE WRIT

The Government does not deny that the respondent was entitled to be notified and to be present at the hearing in the District Court on the motion which he filed under Section 2255.[a] If the Court of Appeals had merely reversed the action of the District Court and remanded the proceeding for a new hearing with respondent present, no further review would be sought. Indeed, in our opinion, that would have been the correct disposition of the case. The Court of Appeals, how-

[a] This was admitted in the Government's petition for rehearing below.

ever, ordered the motion dismissed, both on the ground that Section 2255 is unconstitutional, and that it does not provide an adequate remedy where the presence of a prisoner from without the district is required. This decision precludes a new hearing with the respondent present, and nullifies the procedure embodied in Section 2255 whereby a prisoner is to obtain the equivalent of habeas corpus relief in the court in which he had originally been tried rather than in the court of the district in which he is confined. See Chief Judge Parker, *Limiting the Abuse of Habeas Corpus,* 8 F. R. D. 171. The decision below holding Section 2255 unconstitutional and, in the alternative, unavailable in most of the situations it was meant to reach, thus raises questions of obvious importance. The decision is in conflict with decisions of other circuits, and it is also, in our view, incorrect as a matter of law. The case is thus clearly a proper one for this Court to review.

1. The decision below holding Section 2255 unconstitutional or inapplicable in most cases presents questions of substantial importance in the administration of Federal criminal justice. The evils arising from abusive use of the writ of habeas corpus came to the attention of the Judicial Conference of the United States, which in 1942 appointed a committee under the chairmanship of Chief Judge Parker of the Court of Appeals for the Fourth Circuit to study the mat-

ter and make recommendations. Most of the recommendations made by the Judicial Conference were embodied in bills introduced into Congress, which were subsequently carried into the 1948 revision of the Judicial Code. See Reps. of the Judicial Conference of the United States, September 1943, p. 22; October 1946, p. 21; September 1947, pp. 17–18; 28 U. S. C. 2241, *et seq.* and legislative history of the Revision, 1949 U. S. Code, Cong. Service, pp. 1248–1282. The proposed changes, of which Section 2255 was one, as Chief Judge Parker remarked, "have had the most careful scrutiny of the Judiciary as well as of the Committee on Revision and of the Congress." Parker, *Limiting the Abuse of Habeas Corpus,* 8 F. R. D. 171, 173. The decision below nullifies this important statutory provision.

2. The decision below is in admitted conflict with *Barrett, et al.* v. *Hunter,* 180 F. 2d 510 (C. A. 10), certiorari denied, 340 U. S. 897, and also is in conflict with *Martin* v. *Hiatt,* 174 F. 2d 350 (C. A. 5), both of which sustained the constitutionality of Section 2255. See also *Weber* v. *Steele,* 185 F. 2d 799 (C. A. 8); *Armstrong* v. *Steele,* 181 F. 2d 763 (C. A. 8); *Pinkerton* v. *Steel,* 181 F. 2d 536 (C. A. 8); *Curran* v. *Shuttleworth,* 180 F. 2d 780 (C. A. 6); *Howard* v. *United States,* 186 F. 2d 778 (C. A. 6); *Meyers* v. *Welch,* 179 F. 2d 707, 708 (C. A. 4);

Meyers v. *United States*, 181 F. 2d 802, 804 (C. A. D. C.), certiorari denied, 339 U. S. 983, in all of which the constitutionality of Section 2255 was assumed. In the *Barrett* case the Court of Appeals for the Tenth Circuit held (180 F. 2d at 516) that "So long as there is open to the prisoner a remedy in one court, with full right of review by appeal and petition for certiorari, it is not a suspension of the writ to withhold jurisdiction from other Federal courts, except in cases where the remedy in the sentencing court is inadequate or ineffective." The court stated that the district court could require the presence of a prisoner confined outside the district (p. 514).

In *Martin* v. *Hiatt*, 174 F. 2d 350 (C. A. 5), the Court of Appeals for the Fifth Circuit held the statute valid; it stated that "Congress has not undertaken to suspend the writ but has set up procedure that is designed to supply a more appropriate remedy to those unlawfully detained as well as to preserve the writ for those who are entitled to it and at the same time to protect it from abuse by those who do not deserve it, but who clamor for it incessantly" (174 F. 2d at 352).

In view of this admitted conflict in the decisions on the constitutionality of Section 2255, the court below itself suggested the necessity for authoritative determination of the question by this Court (R. 35, 49).

3. Whether the requirement of Section 2255 that a federal prisoner seek a correction of judg-

ment in the sentencing court before being allowed to petition for a writ of habeas corpus be deemed a condition precedent to filing of a petition for the writ or a substitute therefor, Congress had the power to prescribe such procedure. See *Ex parte Royall*, 117 U. S. 241; *Ex parte Yarbrough*, 110 U. S. 651. The procedure outlined in Section 2255 does not deny the movant a fair judicial hearing. Basically, only the forum in which the proceedings are brought is changed. There does not seem to be any valid reason why the sentencing court, where the record of trial is preserved and the judge and counsel who participated therein are found, is not a more convenient and appropriate forum for challenging the constitutionality of its judgment than the court which has no previous familiarity with the case but merely happens to have jurisdiction in the district in which the prisoner is detained.

The majority below were of the opinion that the "prompt hearing" provided for in the third paragraph of the section contemplates an "ex parte hearing" exclusively, at which the prosecution is present but not the prisoner, and that the fourth paragraph of that section gives the judge an absolute and unqualified discretion to determine the motion on the merits without requiring the production of the prisoner at the hearing. We submit that such an interpretation of the statute, which gives rise to the doubts as to its validity, is unwarranted and should be avoided.

The correct construction was stated by the Tenth Circuit in the *Barrett* case, 180 F. 2d at 514, as follows: "we think the intention was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the prisoner is unnecessary to afford him the relief to which he is entitled, or where only issues of law are presented. But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of a sound discretion, the Court should require the production of the prisoner." Even in a habeas corpus proceeding, the court does not automatically order the prisoner's production upon the filing of a petition for the writ. It is only when the writ is granted that the prisoner is produced, and the court may decline to issue the writ if on its face the application therefor is baseless as a matter of law. *Walker v. Johnston*, 312 U. S. 275, 284.

We submit, contrary to the views expressed below, that the trial court has power to order the production of the prisoner at a hearing under Section 2255 even when he is confined without the district, and that the section accordingly provides an adequate remedy in such circumstance. Judge Pope, dissenting below, expressed the reasonable view that "inherent" in Section 2255

"is the power to require and secure the presence of the prisoner, where necessary" (R. 50). This follows, as he noted, from the duty of the district court to "grant a prompt hearing," to "determine the issues and make findings of fact," and to "correct the sentence." These provisions necessarily imply a constitutional hearing, with the prisoner present. If there should be any doubt as to this, the section should be construed in a manner which will render it both constitutional and effective to accomplish its useful purpose. Apart from the section itself, the district court has authority to require the prisoner's presence by virtue of 28 U. S. C. 1651, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law." See *Price* v. *Johnston*, 334 U. S. 266, 278–282.

This Court has in many cases held that prisoners must exhaust other remedies before seeking the extraordinary remedy provided by the writ of habeas corpus; this has not been deemed to involve an unconstitutional suspension of the writ. *Gusik* v. *Schilder*, 340 U. S. 128; *Darr* v. *Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114, 116–117; *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168. There is even less reason why Section 2255, which affords a remedy equal in effectiveness to habeas corpus, should be re-

garded as a suspension of the writ. *Martin* v. *Hiatt,* 174 F. 2d 350, 352–353 (C. A. 5).

The remedy afforded by Section 2255 resembles the common law writ of error *coram nobis;* it is designed to provide a simple procedure for correcting an erroneous judgment of conviction. It may be used to modify or revise a judgment of conviction, which habeas corpus traditionally would not do. *Harlan* v. *McGourin,* 218 U. S. 442; *United States* v. *Pridgeon,* 153 U. S. 48, 63. The object and purpose of this section is "to afford a prisoner the right to make a direct attack on the legality of his detention on any of the grounds for collateral attack" that might be set up in an application for a conventional writ of habeas corpus. *Barrett* v. *Hunter, supra,* 180 F. 2d at 513.

The preclusion of an application for a writ of habeas corpus, if the motion under the section is decided aversely to the prisoner, does not impose an absolute rule of *res judicata;* for it saves the right to the writ if "the remedy by motion is inadequate or ineffective to test the legality of his detention." Cf. *Salinger* v. *Loisel,* 265 U. S. 224, 230, 232. In any event, Congress has the power to make a judgment in habeas corpus *res judicata* without violating the provision against suspension of the writ. *Martin* v. *Hiatt,* 174 F. 2d 350, 352–353 (C. A. 5).

Thus, Section 2255 is not an abrogation of the right collaterally to attack a conviction obtained

in violation of constitutional rights. It "preserves the essentials of the remedy afforded by the great writ of freedom, effecting change in procedure only and lessening opportunities for abuse of the writ." *Barrett* v. *Hunter,* 180 F. 2d at 516.

CONCLUSION

In view of the conflict of decisions and the obvious importance of settling the question of the constitutionality of Section 2255, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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